No. _____

In The

Supreme Court of the United States

JEFFERSON A. MCGEE,

Petitioner,

vs.

CITY OF SACRAMENTO,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX

JEFFERSON A. MCGEE
8105 Cottonmill Circle
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(916) 247-2413

Appendix 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFERSON A. MCGEE, No. 18-15844

Plaintiff-Appellant, FILED OCT 19, 2018

v.

CITY OF SACRAMENTO, D.C. No. 2:16-cv-01796-JAM-EFB Eastern District of California, Sacramento

Defendant-Appellee,

ORDER

Before: O'SCANNLAIN, BERZON, and IKUTA, Circuit judges

This court has reviewed the notice of appeal filed May 7, 2018 in the above-referenced district court docket pursuant to the pre-filing review order entered in docket No. 02-80037. Because the appeal is so insubstantial as to not warrant further review, it shall not be permitted to proceed. *See In re Thomas*, 508 F.3d 1225 (9th Cir. 2007), Appeal No. 18-15844 is therefore dismissed.

This order, served on the district court for the Eastern District of California, shall constitute the mandate of this court.

No motion s for reconsideration, rehearing, clarification, stay of the mandate, or any other submission regarding this order shall be filed or entertained.

DISMISSED.

BERZON, Circuit Judge, Dissenting:

I dissent. I would allow the appeal to proceed, as it does not appear to me to be so insubstantial as not to warrant further review.

Appendix 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT XI

Amendment 11 – Judicial Limits. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

Section 1.

Amendment 14 – Citizenship Rights. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title 18 U.S.C. §241

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free

exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Title 18 U.S.C. §242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both;

and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Title 18 U.S.C. §245

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments;

Appendix 6

Title 28 U.S.C. §1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 42 U.S.C. §1981

(a) STATEMENT OF EQUAL RIGHTS

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "MAKE AND ENFORCE CONTRACTS" DEFINED

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Title 42 U.S.C. §1982

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Appendix 7

Title 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,...

Title 42 U.S.C. §1985

(3) DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Appendix 8

Title 42 U.S.C. §1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented;

Title 42 U.S.C. §2000a

(a) EQUAL ACCESS

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) ESTABLISHMENTS AFFECTING INTERSTATE COMMERCE OR SUPPORTED IN THEIR ACTIVITIES BY STATE ACTION AS PLACES OF PUBLIC ACCOMMODATION; LODGINGS; FACILITIES PRINCIPALLY ENGAGED IN SELLING FOOD FOR CONSUMPTION ON THE PREMISES; GASOLINE STATIONS; PLACES OF EXHIBITION OR ENTERTAINMENT; OTHER COVERED ESTABLISHMENTS Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Title 42 U.S.C. §2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title 42 U.S.C. §2000d-7

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

California Civil Code §51

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Appendix 11

California Civil Code §51.7

(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

California Civil Code §52

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

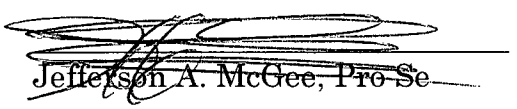
(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8955 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2018.



Jefferson A. McGee, Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

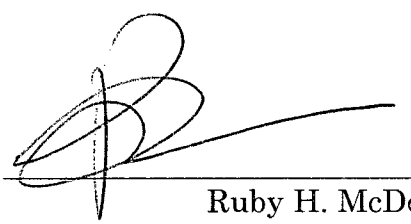
Jefferson A. McGee, Petition v. City of Sacramento, Respondent

CERTIFICATE OF SERVICE

I, Ruby H, McDowell, hereby certify that on this 21st day of December, 2018, I caused three copies of the Petition of Writ of Certiorari to be served by regular U.S. mail on the following counsel:

City of Sacramento Attorney
JAMES SANCHEZ, City Attorney (SBN 116356)
CHANCE L. TRIMM, Senior Deputy City Attorney (SBN 139982)
CITY OF SACRAMENTO
915 I Street, Room 4010
Sacramento, CA 95814-2608

I further certify that all parties required to be served have been served.



Ruby H. McDowell
8105 Cottonmill Circle
Sacramento, CA 95828

No. _____

In The

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JEFFERSON A. MCGEE,

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vs.

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SUPPLEMENTAL APPENDIX

JEFFERSON A. MCGEE
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(916) 247-2413

INDEX TO SUPPLEMENTAL APPENDIX

FILED April 26, 2018

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERSON A. McGEE, No. 2:16-cv-1796-

Plaintiff, JAM-EFB PS

v.

STATE OF CALIFORNIA, et. al., ORDER

Defendants,

_____/

On March 1, 2018, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff filed objections on March 19, 2018, and they were considered by the undersigned.

This court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the motions on the applicable law. *See Orand v. United States*, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. *See Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the proposed Findings and Recommendations in full. Accordingly, IT IS ORDERED that:

1. The proposed Findings and Recommendations filed March 1, 2018, are adopted.

2. The City of Sacramento's motion to dismiss (ECF No. 41) is granted and plaintiff's complaint is dismissed without leave to amend.

3. Plaintiff's motion for summary judgment (ECF No. 52) is denied as moot.

4. All outstanding motions are denied.

5. The Clerk is directed to close the case.

DATED: April 26, 2018

/s/ John A. Mendez

UNITED STATES DISTRICT COURT JUDGE

Supplemental Appendix 4

FILED February 28, 2017

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERSON A. McGEE, No. 2:16-cv-1796-

Plaintiff, JAM-EFB PS

v.

STATE OF CALIFORNIA, FINDINGS AND

et. al., RECOMMENDATIONS

Defendants,

_____/

The last remaining defendant in this action, the City of Sacramento, moves to dismiss plaintiff's complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6). ECF No. 41. Also pending is plaintiff's motion for summary judgment. ECF No. 52.[1] For the reasons explained below, it is recommended that the City's motion be granted and plaintiffs motion be denied.[2]

[1] This case, in which plaintiff is proceeding pro se, is before the undersigned pursuant to Eastern District of California Local Rule 302(21)(c). see 28 U.S.C. § 636(b)(1).

[2] The court determined that oral argument would not materially assist in the resolution of the pending motions and the matters were ordered submitted on the briefs. See E.D. Cal. L.R. 230(g); ECF Nos. 48, 58.

1. Complaint' s Factual Allegations

Plaintiff and his son, who are African American, reside at the Bridgeport Condominium Complex in Sacramento California. ECF No. 1 at 3-4. The crux of the complaint is that throughout 2016, plaintiff and his son were terrorized, harassed, and assaulted by Sean Swarthout, another resident of the condominium complex. According to the complaint, Sean is white and his actions against plaintiff and his son were racially motivated. *Id. at 6.*

On numerous occasions, plaintiff contacted the Sacramento City Police Department for assistance and protection. However, plaintiff claims that the department either refused to respond to his calls, or when they did respond "they saw that plaintiff was African American and Sean was white and decided to discriminate against plaintiff and [his son] because of their race and color by refusing to hear plaintiff's complaint." *Id. at 11.* He further alleges that the decision to not provide assistance was made pursuant to a "policy and conspiracy" to discriminate against African Americans maintained by the State of California, the County of Sacramento, and the City of Sacramento.[3] *Id. at 6.* He also claims that the City of Sacramento was "aware of Sean's crimes against the African American Community, but ha[s] refused to protect the community from Sean because Sean is white." *Id. at 8.*

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[3] In addition to asserting claims against the City of Sacramento, plaintiff's complaint also alleged claims against the State of California and the County of Sacramento. All claims against the state and county were previously dismissed. ECF No. 49.

The complaint alleges federal claims under 42 U.S.C. 1981, 1982, 1983, 1985, 1986 and 2000a, as well as state law claims under California Civil Code 51 and 52. *Id. at 17-20.*

II. City of Sacramento's Motion to Dismiss

A. Rule 12(b)(6) Standards

To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a 'formulaic recitation of the elements of a cause of action"; it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id. (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure*) §1216, pp. 235, 236 (3d ed. 2004)). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, dismissal is appropriate if the complaint lacks a cognizable legal theory or it fails to plead sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425

U.S. 738, 740 (1976), construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor. *Jenkins v. McKeithem,* 395 U.S. 411, 421, *reh'g denied,* 396 U.S. 869 (1969). The court will "presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Nat'l Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 256 (1994) (*quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)).

Plaintiff is proceeding without counsel and pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 520 (1972); *Bretz v. Kelman,* 773 F.2d 1026, 1027 n.l (9th Cir. 1985). But the Ninth Circuit has held that this less stringent standard for pro se parties must still be viewed in light of *Iqbal* and *Twombly. Hebbe v. Pliler,* 627 F.3d 338, 342 (9th Cir. 2010). Further, the court's liberal interpretation of a pro se litigant's pleading may not supply essential elements of a claim that are not pled. *Pena v. Gardner,* 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. Of Regents of Univ. of Alaska,* 673 F.2d 266, 268 (9th Cir. 1982). Further, "[t]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-55 (9th Cir. 1994). Neither need the court accept unreasonable inferences, or unwarranted deductions of fact. *W. Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir. 1981).

B. Discussion

The City of Sacramento moves to dismiss plaintiff's complaint, arguing that plaintiff fails to allege sufficient facts to state a claim for relief. ECF No. 41.

1. 42 U.S.C. §1981

Section 1981 provides that "[a]ll persons shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. That section "protects the equal right of all persons within the jurisdiction of the United States to make and enforce contracts without respect to race." *Domini's Pizza, Inc. v. McDonald,* 546 U.S. 470 at 474. The complaint is devoid of any fact concerning a contract or impaired contractual relationship. *See Id.* at 479-80; *Schiff v. Barrett*, 2010 WL 2803037, at *4 (E.D. Cal. July 14, 2010) (providing that to state a claim under 1981 a plaintiff must identify an "impaired contractual relation" by showing that intentional racial discrimination prevented the creation of a contractual relationship or impaired an existing contractual relationship). Accordingly, plaintiff fails to state a claim under section 1981.

2. 42 U.S.C. §1982

Plaintiff also asserts a claim under 42 U.S.C. 1982. That section provides that all citizens shall have the same right "to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. §1982. To state a claim under section 1982, a plaintiff must allege that (1) he is a member of a racial minority; (2) he applied for and was qualified to rent or purchase certain property or

housing; (3) he was rejected; and (4) the housing or rental opportunity remained available thereafter. *Phifer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980).

The complaint's allegations concern the Sacramento Police Department's response to plaintiff's calls for assistance, not the lease or purchase of property or housing. Thus, section 1982 has no relevance to the instant action and plaintiff's claim for violation of that statute must be dismissed.

3. 42 U.S.C. §1983

Plaintiff alleges that the City violated his constitutional rights under the Fourteenth Amendment "pursuant to a Policy and conspiracy as adopted, implemented, maintained and executed by . . . the City." ECF No. 1 at 1. The City argues that plaintiff's 1983 claim must be dismissed because plaintiff fails to sufficiently allege facts demonstrating that his constitutional rights were violated pursuant to a City policy or practice. ECF No. 41-1 at 4-5.

To state a claim under 42 U.S.C. §1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins,* 487 U.S. 42, 48 (1988). However, there is no respondent superior liability under 1983. See *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy,* 588 F.2d 740, 743-44 (9th Cir. 1978). Therefore, counties and municipalities may be sued under 1983 only upon a showing that plaintiff's constitutional injury was caused by an employee acting

pursuant to the municipality's policy or custom. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). To state a claim under *Monell*, a party must (1) identify the challenged policy or custom; (2) explain how the policy or custom is deficient; (3) explain how the policy or custom caused the plaintiff harm; and (4) reflect how the policy or custom amounted to deliberate indifference, i.e. show how the deficiency involved was obvious and the constitutional injury was likely to occur. *Young v. City of Visalia,* 687 F. Supp. 2d 1141, 1149 (E.D. Cal. 2009). Plaintiff has not satisfied these requirements. He has failed to identify any particular policy or custom of the City of Sacramento or the Sacramento Police Department that resulted in deprivation of his constitutional rights. Instead, plaintiff claims that on various occasions he was subjected to discriminatory treatment by Sacramento City Police officers, and concludes that the officers were acting "pursuant to the State, the County, and the City's Policy and conspiracy to Discriminated [sic] Against African Americans on the Grounds of their Race in Law Enforcement Programs and Activities." *See* ECF No.1 at 6-8, 11, 15.

Plaintiffs conclusory statement that the officers' alleged wrongful conduct was performed pursuant to a State, County, and City policy and conspiracy to discriminate is insufficient to support a *Monell* claim. *See Galen v. County of Los Angeles*, 477 F.3d 652, 667 (9th Cir. 2007) (to succeed on a *Monell* claim a plaintiff must establish that the entity 'had a deliberate policy, custom, or practice that was the moving force behind the alleged constitutional violation he suffered") (internal quotation marks omitted)); *Brown v. Contra Costa County,* 2014 WL 1347680, at *8

(N.D. Apr. 3, 2014) ("Pursuant to the more stringent pleading requirements set forth in *Iqbal* and *Twombly*, a plaintiff suing a municipal entity must allege sufficient facts regarding the specific nature of the alleged policy, custom or practice to allow the defendant to effectively defendant itself, and these facts must plausibly suggest that plaintiff is entitled to relief.") (citing *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012)).

Accordingly, plaintiff fails to state a 1983 claim against the City of Sacramento.

4. 42 U.S.C. §1985

Plaintiff also purports to alleges a claim under 42 U.S.C. 1985(3). That section creates a civil action for damages caused by two or more persons who "conspire . . . for the purpose of depriving" the injured person of "the equal protection of the laws, or of equal privileges and immunities under the laws" and take or cause to be taken "any act in furtherance of the object of such conspiracy." 42 U.S.C. 1985(3). The elements of a §1985(3) claim are: (1) the existence of a conspiracy to deprive the plaintiff of the equal protection of the laws; (2) an act in furtherance of the conspiracy; and (3) a resulting injury. *Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1141 (9th Cir. 2000) (citing *Scott v. Ross,* 140 F.3d 1275, 1284 (9th Cir. 1998)). The first element requires that there be some racial or otherwise class-based "invidious discriminatory animus" for the conspiracy. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 268-69 (1993); *Trerice v. Pedersen*, 769 F.2d 1398, 1402 (9th Cir. 1985). Moreover, a plaintiff cannot state a conspiracy claim under 1985 in the absence of a claim for

deprivation of rights under 42 U.S.C. §1983. *See Caldeira v. Cnty. of Kauai*, 866 F.2d 1175, 1182 (9th Cir. 1989) (holding that "the absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations"), *cert. denied*, 493 U.S. 817 (1989).

Although plaintiff alleges racial animus, as discussed above, he does not sufficiently allege facts that can state a claim under 1983 against the City. Nor has he alleged that there was any agreement or "meeting of the minds" by the defendants to deprive him of those constitutional rights. Accordingly, this claim must also be dismissed.

5. 42 U.S.C. §1986

"Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi v. Los Angeles Police Dept.,* 839 F.2d 621, 626 (9th Cir. 1988). Absent a valid claim for relief under section 1985, there is no cause of action under 1986. *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985). As noted above, plaintiff fails to state a claim under section 1985. Consequently, he also fails to state a claim pursuant to section 1986.

6. 42 U.S.C. §2000a

Plaintiff also alleges a claim under Title II of the Civil Rights Act of 1964. ECF No. 1 at19. Section 42 U.S.C. 2000a provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without

discrimination or segregation on the ground of race, color, religion, or national origin." Places of public accommodation are defined as places that serve the public including places of lodging, restaurants or other facilities selling food for consumption, movie theaters, sports arenas, and any other place of exhibition or entertainment. 42 U.S.C. 2000a(b).

The complaint does not allege that the City denied plaintiff any goods or services "of any place of public accommodation," as that term is defined by Title II. Accordingly, plaintiff's ADA claim must be dismissed.

7. State Law Claims

Plaintiff also purports to allege state law claims for racial discrimination pursuant to California Civil Code 51 and 52.

As plaintiff has failed to state a federal claim for relief, the court should decline to exercise supplemental jurisdiction over plaintiff's state law claim. *See Carlsbad Tech., Inc. v. HIE BIO, Inc.,* 556 U.S. 635, 639-40 (2009); *Albingia Versichrungs A.G. v. Schenker Int'l Inc.,* 344 F.3d 931, 936 (9th Cir. 2003); 28 U.S.C. 1367(c) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if ... the district court has dismissed all claims over which it has original jurisdiction."). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie—Mellon Univ. v.*

Cohill, 484 U.S. 343, 351 (1988). Indeed, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1966).

As discussed above, all of plaintiff's federal claims must be dismissed. Further, both plaintiff and the City of Sacramento are citizens of California. Accordingly, the court should decline to exercise supplemental jurisdiction over plaintiff's state law claims.

8. Leave to Amend

The court has carefully considered whether leave to amend is appropriate in this case.

The instant case is one of many actions plaintiff has filed in this district, the vast majority of which have been dismissed as for failure to state a claim. *See McGee v. California*, 2: 14-cv-823 JAM-KJM (E.D. Cal); *McGee v. Attorney General of California,* 2:10-cv-137-KJM (E.D. Cal); *McGee v. California,* 2:09-cv-740-GEB-EFB (E.D. Cal); *McGee v. Seagraves,* 2:06-cv-495-MCE-GGH (E.D. Cal); *McGee v. MMDD Sacramento Project,* 2:05-cv-339-WBS-DAD (E.D. Cal.); *McGee v. California State Senate,* 2:05-cv-2632-GEB-EFB (E.D. Cal.); *McGee v. Schwarzenegger,* 2:04-cv-2598-LKK-DAD (E.D. Cal); *McGee v. Davis,* 2:01-mc-179-LKK-PAN; *McGee v. Wilson,* 2:98-cv-1026-FCD-PAN (E.D. Cal); *McGee v. California,* 2:14-cv-823-JAM-KJM (E.D. Cal.). These cases demonstrate a history of plaintiff filing complaints that assert vague and general allegations of discrimination without specific facts that could

entitle him to relief on any particular cause of action. Notably, in *McGee v. California,* 2:14-cv-823-JAM-KJM (E.D. Cal.), plaintiff alleged, among other things, that numerous defendants, including the State of California, County of Sacramento, and the Sacramento City Police Department, "used law enforcement programs and activities . . . to discriminate against plaintiff on the grounds of his race and solely on account that plaintiff is African American." *Id,* Compl. §17. Like the instant action, plaintiff alleged claims for violations of 42 U.S.C. 1981, 1982, 1983, 1985, 1986, & 2000, as well as violation of California Civil Code 51 & 52, which were based, at least in part, on various hostile encounters with city and county law enforcement agencies occurring between 1993 and 2014. *See Id.*, ECF No. 17. And in the instant action plaintiff again has failed to articulate facts which can state a plausible claim against the city.

In light of the deficiencies in the complaint, as well as plaintiff' s extensive history of filing deficient complaints, the court finds that granting leave to amend would be futile. Accordingly, it is recommended that the City of Sacramento's motion to dismiss be granted and plaintiffs complaint be dismissed without leave to amend. *Noll v. Carlson,* 809 F.2d 1446, 1448 (9th Cir. 1987) (While the court ordinarily would permit a pro se plaintiff to amend, leave to amend should not be granted where it appears amendment would be futile).[4]

[4] As plaintiff's complaint must be dismissed without leave to amend, his motion for summary judgment is moot.

III. Vexatious Litigant Motion

The City of Sacramento initially moved to declare plaintiff a vexatious litigant. ECF No. 9. Because the City had not yet filed a responsive pleading or motion in accordance with Rule 12 of the Federal Rules of Civil Procedure, the court deferred ruling on the vexatious litigant motion until resolution of any motion brought under Rule 12 or, if appropriate, Rule 56. *See* ECF No. 40.

Should the City still wish to pursue its vexation litigant motion, it shall, within 7 days of any order adopting or declining to adopt these findings and recommendations, notice its motion for hearing in compliance with Local Rule 230. *Ringgold—Lockhart v. County of Los Angeles,* 761 F.3d 1057, 1062 (9th Cir. 2014) (prior to entering an order imposing pre-filing restrictions, a district court must give the litigant notice and "an opportunity to oppose the order before it is entered."). Should the City fail to notice the motion for hearing, it will be recommended that the motion be denied and the case be closed.

IV. Conclusion

Accordingly, it is hereby RECOMMENDED that:

1. The City of Sacramento's motion to dismiss (ECF No. 41) be granted and plaintiff's compliant be dismissed without leave to amend.

2. Plaintiff's motion for summary judgment (ECF No. 52) be denied as moot.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan,* 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylist,* 951 F.2d 1153 (9th Cir. 1991).

DATED: February 28, 2018.

/s/ EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

FILED APRIL 19, 2017

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERSON A. McGEE, NO.: 2:16-cv-1796

Plaintiff, JAM-EFB-PS

v.

STATE OF CALIFORNIA, ORDER

Defendants,

_____/

On March 3, 2017, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff filed objections on March 20, 2017, and they were considered by the undersigned.

This court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the motions

on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. See Britt v. Simi Valley Unified Sch. Dist., 708 .2d 452, 454 (9th Cir. 1983).

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the proposed Findings and Recommendations in full.

Accordingly, IT IS ORDERED that:

1. The proposed Findings and Recommendations filed March 3, 2017, are adopted;

2. The County of Sacramento and State of California's motions to dismiss (ECF Nos. 13, 22) are granted and all claims against these defendants are dismissed without leave to amend; and

3. Plaintiff's motion for default judgment (ECF No. 15) is denied.

DATED: April 19, 2017

/s/ John A. Mendez

UNITED STATES DISTRICT COURT JUDGE

FILED MARCH 2, 2017

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERSON A. McGEE, NO.: 2:16-cv-1796

Plaintiff, JAM-EFB-PS

v.

STATE OF CALIFORNIA, ORDER AND

Defendants, FINDINGS AND

RECOMMENDATIONS

_____/

This case is before the court on defendant City of Sacramento's motion to declare plaintiff a vexatious litigant and for an order compelling plaintiff to provide security (ECF No. 9); defendants County of Sacramento and the State of California's motions to dismiss plaintiff' s complaint for failure to state a claim pursuant to Federal Rule of Civil Procured ("Rule") 12(b)(6) (ECF Nos. 13 and 22); plaintiff's motion for default judgment against California and the City and County of Sacramento (ECF No. 15); and the court's October 7, 2016 order to show cause (ECF

No. 28).[5] For the reasons explained below, the court discharges the order to show cause, defers ruling on the vexatious litigant motion, and recommends that Sacramento County and the State of California's motions to dismiss be granted and plaintiff' s motion for default judgment be denied.[6]

1. Order to Show Cause

Defendants County of Sacramento and the State of California filed motions to dismiss the complaint, which were noticed for hearing on October 19, 2016. ECF Nos. 13, 22, 25. Pursuant to Local Rule 230(c), plaintiff was required to file an opposition or statement of non-opposition to the motions by October 5, 2016, but failed to do so. Accordingly, the hearing on the motions was continued and plaintiff was ordered to file an opposition or statement of non-oppositions to the motions and to show cause why sanctions should not be imposed for his failure to timely do so. In his response plaintiff states that he mailed his opposition to the County' s motion on September 17, 2016, and his opposition to the State of California's motion on October 4, 2016. While the court belatedly received plaintiff's opposition to the State's motion on October 6, 2016, plaintiff did not file his opposition to the County's motion until November 2, 2016, the same date he filed his response to the court's order to show cause. In light of plaintiff's pro se status, and given that he has now

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[5] This case, in which plaintiff is proceeding pro se, is before the undersigned pursuant to Eastern District of California Local Rule 3020(21). See 28 U.S.C. §636(b)

[6] The court determined that oral argument would not materially assist in the resolution of the pending motions and the matter was ordered submitted on the briefs. See E.D. Cal. L.R. 230(g).

filed oppositions to the pending motions, the court discharges the order to show cause and declines to impose sanctions. Plaintiff is admonished, however, that his pro se status does not excuse compliance with the Federal Rules of Civil Procedures, Local Rules, and court orders.

II. Vexatious Litigant Motion

Defendant City of Sacramento, instead of filing a responsive pleading or motion in accordance with Rule 12 of the Federal Rules of Civil Procedure, filed a motion for an order declaring plaintiff a vexatious litigant and requiring security under Local Rule 151(b). ECF No 9. Local Rule 151 (b) adopts the provisions of Title 3A, part 2, of the California Code of Civil Procedure relating to vexatious litigants. One of those provisions provides that when a vexatious litigant motion is filed prior to trial, the litigation — including the moving defendant' s obligation to plead — is stayed. Cal. Civ. Proc. Code 391.6. Setting aside the question of whether that stay provision is in variance with the pleading practices prescribed by the Federal Rules of Civil Procedure, Local Rule 151(b) also states that the Court's power "shall not be limited by this provision." See E.D. Cal. L.R. 151(b). Here, the City's motion calls upon the court to examine the merits of plaintiff's complaint. See *DeLong v. Hennesey*, 912 F.2d 1144, 1148 (9th Cir. 1990) (before a court may enter a pre-filing injunction it must make "substantive findings as to the frivolous or harassing nature of the litigant's actions."). The standards and procedures for determining whether plaintiff's complaint is sufficient to state a claim are set out in Rule 12 Of the Federal Rules of Civil Procedure and governed by federal, not state law. For

that reason, the court exercises its discretion under Local Rule 151 (b) to require the City to address its contention that plaintiff's complaint is either frivolous or fails to state a claim pursuant to a properly noticed and briefed motion presented under either Rule 12 or Rule 56 of the Federal Rules of Civil Procedure. Accordingly, ruling on the pending vexatious litigant motion is deferred pending resolution of any motion brought under Rule 12 or, if appropriate, Rule 56, together with appropriate briefing that addresses the standards under those rules.

III. Rule 12(b)(6) Motions

The County of Sacramento and the State of California both move to dismiss plaintiff's complaint for failure to state a claim pursuant to Rule 12(b)(6). ECF Nos. 13, 22. As explained below, the motions must be granted.

A. Complaint's Factual Allegations

Plaintiff and his son reside at the Bridgeport Condominium Complex in Sacramento California. ECF No. 1 at 3-4. The crux of the complaint is that throughout 2016, plaintiff and his son were terrorized, harassed, and assaulted by Sean Swarthout, another resident of the condominium complex.[7] Plaintiff alleges Swarthout's actions against plaintiff and his son were racially motivated. *Id. at 6.*

[7] In addition to the City, County, and State, the complaint names Sean Swarthout; Gary Swarthout, Jr.; Bridgeport Homeowners Association; Associa of Northern California (a property management company); and Sacramento Elite Security as defendants. See ECF No. 1. However, plaintiff has requested that these defendants, who have not appeared in this action, be dismissed without prejudice. ECF No. 33. The court recommends that the request be granted and these defendants be dismissed without prejudice.

On numerous occasions, plaintiff contacted the Sacramento City Police Department for assistance and protection. However, plaintiff claims that the department either refused to respond to his calls, or when they did respond "they saw that plaintiff was African American and Sean was white and decided to discriminate against plaintiff and [his son] because of their race and color by refusing to hear plaintiff's complaint." *Id. at 11.* He further alleges that the decision to not provide assistance was made pursuant to the departments "policy and conspiracy" to discriminate against African Americans. *Id. at 6.* The complaint further alleges that the "State, the County, and the City are all aware of Sean' s crimes against the African American Community, but have refused to protect the community from Sean because Sean is white." *Id. at 8.*

The complaint alleges federal claims under 42 U.S.C. 1981, 1982, 1983, 1985, 1986 and 2000a, as well as state law claims under California Civil Code 51 and 52. *Id. at 17-20.* The County of Sacramento and State of California move to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6). ECF Nos. 13, 22.

B. Rule 12(b)(6) Standards

To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action"; it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain something more . . .than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.*

(quoting 5 C. Wright & A. Miller, Federal Practice and Procedure 1216, pp. 235236 (3d ed. 2004)). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Dismissal is appropriate based either on the lack of cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal theories. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor. *Jenkins v. McKeithem,* 395 U.S. 411, 421, reh'g denied, 396 U.S. 869.(1969). The court will "presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 56 (1992)).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Bretz v. Kelman,* 773 F.2d 1026, 1027 n. l (9th Cir. 1985). The Ninth Circuit has held that the less stringent standard for pro se parties is now higher in light of *Iqbal* and *Twombly*, but the court still continues to construe pro se filings liberally. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th

Cir. 2010). However, the court's liberal interpretation of a pro se litigant's pleading may not supply essential elements of a claim that are not pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Furthermore, "[t]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Neither need the court accept unreasonable inferences, or unwarranted deductions of fact. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

In deciding a Rule 12(b)(6) motion to dismiss, the court may consider facts established by exhibits attached to the complaint. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also consider facts which may be judicially noticed, *Mullis v. U.S. Banker. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987), and matters of public record, including pleadings, orders, and other papers filed with the court, *Mack v. South Bay Beer Distribs.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

C. Sacramento County's Motion

Sacramento County moves to dismiss for failure to allege sufficient facts to state a claim for relief. ECF No. 13.

1. 42 U.S.C. § 1981

Section 1981 provides that "[a]ll persons shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981.

That section "protects the equal right of all persons within the jurisdiction of the United States to make and enforce contracts without respect to race." *Domini's Pizza, Inc. v. McDonald*, 546 U.S. 470 at 474. While plaintiff makes general and vague allegations of racial discrimination, he does not allege a contractual relationship between himself and any other party, nor does he allege any facts that could possibly suggest the existence of such a relationship. *See Id.* at 479-80; *Schiff v. Barrett*, 2010 WL 2803037, at *4 (E.D. Cal. July 14, 2010) (providing that to state a claim under 1981 a plaintiff must identify an "impaired contractual relation" by showing that intentional racial discrimination prevented the creation of a contractual relationship or impaired an existing contractual relationship). Accordingly, plaintiff's section 1981 claim against the County must be dismissed.

2. 42 U.S.C. §1982

Plaintiff also asserts a claim under 42 U.S.C. §1982. That section provides that all citizens shall have the same right "to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. §1982. To state a claim under section 1982, a plaintiff must allege that (1) he is a member of a racial minority; (2) he applied for and was qualified to rent or purchase certain property or housing; (3) he was rejected; and (4) the housing or rental opportunity remained available thereafter. *Phifer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980).

This section has no relevance to the facts alleged in the complaint. Those allegations concern the Sacramento Police Department's response to plaintiff' calls for assistance and not the lease or purchase of property or housing. Plaintiff alleges no facts showing that he applied for and was denied housing by defendants on the basis of race. This claim must therefore be dismissed.

3. 42 U.S.C. §1983

Plaintiff alleges that the County violated his constitutional rights under the Fourteenth Amendment "pursuant to a Policy and conspiracy as adopted, implemented, maintained and executed by the State, the County, and the City." ECF No. 1 at 1. The County argues that plaintiff's 1983 claim must be dismissed because plaintiff failed to allege facts showing that a county employee violated his rights pursuant to a policy or custom. ECF No. 13-1 at 4-9.

To state a claim under 42 U.S.C. §1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). However, there is no *respondeat superior* liability under 1983. *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). Therefore, counties and municipalities may be sued under 1983 only upon a showing that plaintiff's constitutional injury was caused by an employee acting pursuant to the municipality's policy or custom. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). In order to state a claim under *Monell*, a party must (1)

identify the challenged policy or custom; (2) explain how the policy or custom is deficient; (3) explain how the policy or custom caused the plaintiff harm; and (4) reflect how the policy or custom amounted to deliberate indifference, i.e. show how the deficiency involved was obvious and the constitutional injury was likely to occur. *Young v. City of Visalia*, 687 F. supp. 2d 1141, 1149 (E.D. Cal. 2009).

Plaintiff's section 1983 claim against the County fails for a number of reasons. First, he does not identify any specific policy or custom that allegedly cause him harm. Instead, the complaint asserts only vague allegations that the County maintains a policy of discrimination. Second, the complaint does not contain any allegations indicating that plaintiff was harmed by a county employee pursuant to a policy or custom. While plaintiff states that the County was aware of Sean Swarthout's conduct and alleges in conclusory fashion that it maintained a policy of discrimination, plaintiff does not allege any county employees took any action against him. Instead plaintiff' s allegations of harassment are directed at conduct by Sacramento City Police officers, not county employees.

Accordingly, plaintiff fails to allege a §1983 claim against the County.

4. 42 U.S.C. §1985

Plaintiff also attempts to assert a claim under 42 U.S.C. §1985(3). That section creates a civil action for damages caused by two or more persons who "conspire . . . for the purpose of depriving" the injured person of "the equal

protection of the laws, or of equal privileges and immunities under the laws" and take or cause to be taken "any act in furtherance of the object of such conspiracy." 42 U.S.C. §1985(3). The elements of a §1985(3) claim are: (1) the existence of a conspiracy to deprive the plaintiff of the equal protection of the laws; (2) an act in furtherance of the conspiracy; and (3) a resulting injury'. *Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1141 (9th Cir. 2000) (citing *Scott v. Ross*, 140 F.3d 1275, 284 (9th Cir. 1998)). The first element requires that there be some racial or otherwise class-based "invidious discriminatory animus" for the conspiracy. *Bray v. Alexandria Women 's Health Clinic*, 506 U.S. 263, 268-69 (1993); *Trerice v. Pedersen,* 769 F.2d 1398, 1402 (9th Cir. 1985). Moreover, a plaintiff cannot state a conspiracy claim under 1985 in the absence of a claim for deprivation of rights under 42 U.S.C. §1983. *See Caldeira v. Cnty. of Kauai,* 866 F.2d 1175, 1182 (9th Cir. 1989) (holding that "the absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations"), cert. denied, 493 U.S. 817 (1989).

As discussed above, plaintiff does not allege facts sufficient to state a claim under § 1983 against the County. Nor has he alleged that there was any agreement or "meeting of the minds" by the defendants to deprive him of those constitutional rights. Accordingly, this claim must also be dismissed.

5. 42 U.S.C. §1986

"Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-*

Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988). Absent a valid claim for relief under section 1985, there is no cause of action under 1986. *Trerice v. Pedersen,* 769 F.2d 1398, 1403 (9th Cir. 1985).

As noted, plaintiff has not alleged any agreement or "meeting of the minds" by the defendants to state a claim for deprivation of his constitutional rights under section 1985. Consequently, he also fails to state a claim pursuant to section 1986.

6. 42 U.S.C. § 2000a

Plaintiff also alleges a claim under Title II of the Civil Rights Act of 1964. ECF No. 1 at 19. Section 42 U.S.C. § 2000a provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."

As argued by the County, plaintiff's sole allegation against this defendant is his conclusory assertion that the County has unconstitutional policies "to Discriminate Against African Americans on the Grounds of Race in Law Enforcement Programs and Activities." No facts are alleged to support that conclusion. Further, even assuming the truth of this allegation, plaintiff does not allege that the county denied him goods or services of any place of public accommodation. See 42 U.S.C. §2000a(b) (identifying places of public accommodation as placing of lodging, restaurants, and movie theaters). As already noted, plaintiff alleges that Sacramento City Police Officers, not

Sacramento County employees, failed to properly respond to his requests for assistance. Accordingly, plaintiff fails to allege a claim for violation of 42 U.S.C. §2000a against the County of Sacramento.

7. State Law Claims

Plaintiff also purports to allege state law claims for racial discrimination pursuant to California Civil Code 51 and 52. As explained above, the complaint does not contain any factual allegations that the County subjected him to racial discrimination. Rather, he merely relies on his conclusory statement that the County maintains some unspecified policy to discriminate against African Americans. Accordingly, his state law claims also fail.

D. State of California's Motion to Dismiss

The State of California moves to dismiss plaintiff's complaint, arguing that it is entitled to immunity under the Eleventh Amendment to the United States Constitution. ECF No. 22 at 4-6, Plaintiff argues that the State of California's motion should be denied because (1) it is untimely and (2) the state is not entitled to sovereign immunity under the Eleventh Amendment. ECF No. 32 at 15-17.

As a threshold matter, plaintiff is mistaken that the State's motion is untimely. The Ninth Circuit "allows a motion under Rule 12(b) any time before the responsive pleading is filed." *Aetna Life Ins. Co. v. Alla Medical Services, Inc.,* 855 F.2d 1470, 1474 (9th Cir. 1988); see also *Ass'n of Irritated Residents v. Fred Shakel Dairy,* 2005 WL 3299508, at *3 (E.D. Cal. Dec. 2, 2005) ("the Ninth Circuit allows a motion under Rule 12(b) any time before the responsive pleading is filed, even if

filed outside the time limits of Rule 12(a)(1).") (internal quotations omitted). As no answer has been filed, the State's motion is timely.

Plaintiff next argues that Congress abrogated the states' immunity by enacting 42 U.S.C. § 2000d-7. ECF No. 32 at 15-17. That section expressly waives state sovereign immunity for violations of "section 504 of the Rehabilitation Act of 1973, title of the Education Amendments of 1972, Title IX of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. §2000d-7. As far as the court can discern, plaintiff appears to argue that the residual clause of section 2000d-7 constitutes a waiver for all of his claims. Contrary to plaintiff's contention, the State is entitled to immunity under the Eleventh Amendment.

It is well settled that the Eleventh Amendment bars a citizen from bringing suit against his own state in Federal Court absent a valid waiver or abrogation of sovereign immunity. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 55 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890); *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) ("The Eleventh Amendment bars suits which seek either damages or injunctive relief against a state, an 'arm of the state,' its instrumentalities, or its agencies.").

Congress may abrogate a state's sovereign immunity, but the Supreme Court has consistently held that §1983 was not intended to abrogate a State's Eleventh Amendment Immunity. *Kentucky v. Graham,* 473 U.S. 159, 169 n.17 (1985). Moreover, the Ninth Circuit has held that sovereign immunity is not waived as to

claims brought under 42 U.S.C. §§1981, 1983, or 1985. *Pitman v. Oregon, Employment Department,* 509 F.3d 1065, 1071-72 (9th Cir. 2007); *Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). Other courts have also held that states are immune from suit under the Eleventh Amendment from claims brought pursuant to 42 U.S.C. §§1982 and 1986. *See Ross v. State of Ala.*, 893 F. Supp. 1545 (M.D. Ala. 1995) (holding that "under §1982, Congress has not waived Eleventh Amendment immunity, because it did not make its intention unmistakably clear in the language of the statue."); *Shaughnessy v. Hawaii*, 2010 WL 2573355, at *6 ("[C]ourts have consistently held . . . that the Eleventh Amendment bars 1981 and 1982 suits against the states . . . ."); *Ardalan v. McHugh,* 2013 WL 6212710, at *13 (N.D. Cal. Nov. 27, 2013) (finding that plaintiff's claims for violation of 1981, 1983, 1985, and 1986 were barred by the doctrine of sovereign immunity). Furthermore, plaintiff's state law claims are similarly barred under the doctrine of sovereign immunity. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 9th Cir. 2004); *See also Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

The only claim alleged by plaintiff that could conceivably implicate the residual clause contained in 42 U.S.C. §2000d-7(a)(1) is his claim under Title II of the Civil Rights Act of 1964. The State contends, however, "that in *Sossamon v. Texas,* 563 U.S. 277 (2011), the U.S. Supreme Court held that the Eleventh

Amendment provision under 42 U.S.C. §2000d-7(a)(1) is unconstitutional." ECF No. 36 at 2-3.

In *Sossamon*, the court considered whether a Prison inmate' s claim under §3 of the Religious Land Use and Institutionalized Persons Act ("RLUIPA') against the state of Texas was barred under the Eleventh Amendment. The inmate argued, among other things, that his claim under §3 of the RLUIPA fell under the residual clause of 42 U.S.C. §2000d-7(a)(1), and therefore Texas had waived sovereign immunity to RLUTPA suits for damages. *Id.* at 291. The court rejected this argument, reasoning that "even assuming that a residual clause like the one in [§ 2000d-7] could constitute an unequivocal textual waiver, §3 [of the RLUIPA] is not unequivocally a statute prohibiting discrimination within the meaning of [§ 2000d-7." *Id.* The court determined that a state could reasonably conclude that the residual clause only covers provisions using the term "discrimination." *Id.*

Thus, the court merely decided that § 3 of the RLUIPA was not covered by the residual clause. It did not, as argued by California, find that §2000d-7's waiver of immunity was unconstitutional.

The court need not decide whether the residual clause of section 2000d-7 constitutes an unequivocal textual waiver because, even assuming that it does, plaintiff nevertheless fails to state a Title II claim against the State.[8] As with the

[8] Few courts have addressed the waiver issue in this case. However, at least one court has determined that there is no waiver of sovereign immunity for claims brought under Title II of the Civil Rights Act. *See Zhu v. Gonzales,* 2006 WL 1274767, at *5 (D.D.C. May 8, 2006).

claims against the County, the allegations in support of this claim are conclusory and fail to state a claim for relief. Plaintiff alleges that defendants maintain unspecified policies and customs "to Discriminate Against African Americans on the Grounds of Race and Color in Law Enforcement Programs and Activities receiving federal financial assistance from the United States Government." ECF No. 1 at 19. Plaintiff, however, fails to allege that the State denied him the full and equal enjoyment of "goods, services, facilitates, privilege, advantages and accommodations" due to discrimination based on his race. 42 U.S.C. §2000a(a); *See also id* §2000a(b). Again, plaintiff's allegations are directed solely at conduct performed by the Sacramento Police Department, and not a state agency or employee.

E. Leave to Amend

The court has carefully considered whether leave to amend is appropriate in this case. As detailed above, the factual allegations in the complaint do not address conduct by the County or the State. Instead, plaintiff alleges actions by a Sacramento City Police officer, with only legal conclusions asserted against the County and State. It is clear from his complaint that the Police Officer's actions (or failure to act) are the focus of plaintiff's claims and not actions by either the County or the State. Thus, leave to amend will not cure the deficiencies in these claims. This point is underscored by the fact that the instant case is simply one of many actions plaintiff has filed in this district, the vast majority of which have been dismissed as for failure to state a claim. *See McGee v. California,* 2:14-cv-823-JAM-

KJM (E.D. Cal); *McGee v. Attorney General of California,* 2:10-cv-137-KJM (E.D. Cal); *McGee v. California,* 2:09-cv-740-GEB-EFB (E.D. Cal); *McGee v. Seagraves,* 2:06-cv495-MCE-GGH (E.D. Cal); *McGee v. MMDD Sacramento Project,* 2:05-cv-339-WBS-DAD (E.D. Cal.); *McGee v. California State Senate,* 2:05-cv-2632-GEB-EFB (E.D. cal.); *McGee v. Schwarzenegger,* 2:04-cv-2598-LKK-DAD (E.D. Cal); *McGee v. Davis,* 2:01-mc-179-LKK-PAN; *McGee v. Wilson,* 2:.98-cv-1026-FCD-PAN (E.D. Cal).

In light of the deficiencies in the complaint, as well as plaintiff's extensive history of filing deficient complaints, the court finds that granting leave to amend would be futile. Accordingly, it is recommended that the State of California and the County of Sacramento's motions to dismiss be granted and the claims against them be dismissed without leave to amend. *Noll v. Carlson,* 809 F.2d 1446, 1448 (9th Cir. 1987) (While the court ordinarily would permit a pro se plaintiff to amend, leave to amend should not be granted where it appears amendment would be futile).

IV. Plaintiff's Motion for Default Judgment

Plaintiff moves for default judgment against defendants State of California, City of Sacramento, and County of Sacramento. ECF No. 15. Federal Rule of Civil Procedure 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Entry of default against a defendant cuts off that defendant's right to appear in the action or to present evidence. *Clifton v. Tomb,* 21 F.2d 893, 897 (4th Cir. 1927).

Here, defendants have appeared in this action and filed motions in response to plaintiff's complaint. Given that each defendant has appeared and indicated its intention to defend against plaintiff's claims, entry of default judgment is inappropriate. Accordingly, the motion must be denied.

V. Conclusion

Accordingly, it is hereby ORDERED that:

1. The court's order to show cause (ECF No. 28) is discharged and no sanctions are imposed;

2. Within 30 days from the date of this order, defendant City of Sacramento shall file a responsive pleading or motion in accordance with Rule 12 (or if appropriate Rule 56); and

3. Ruling on the motion to declare plaintiff a vexatious litigant (ECF No. 9) is deferred pending the resolution of any Rule 12 or Rule 56 motion by the City. The Clerk shall terminate ECF No. 9. With any answer, the City may file a notice of renewal.

Further, it is RECOMMENDED that:

1. The County of Sacramento and State of California's motions to dismiss (ECF Nos. 13, 22) be granted and all claims against these defendants be dismissed without leave to amend; and

2. Plaintiff's motion for default judgment (ECF No. 15) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan,* 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Yist*, 951 F.2d 1153 (9th Cir, 1991).

DATED: March 2, 2017.

/s/ EDMUND F, BRENNAN

UNITED STATES MAGISTRATE JUDGE

FILED AUGUST 31, 2016

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERSON A. McGEE, NO.: 2:16-cv-1796

Plaintiff, JAM-EFB-PS

v.

STATE OF CALIFORNIA, ORDER

Defendants,

_____/

On August 10, 2016, the magistrate judge filed findings and recommendations herein which were served on plaintiff and which contained notice that any objections to the findings and recommendations were to be filed within fourteen days. No objections were filed.

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the proposed Findings and Recommendations in full.

Accordingly, IT IS ORDERED that:

1. The proposed Findings and Recommendations filed August 10, 2016, are ADOPTED; and

2. Plaintiffs motion for injunctive relief (ECF No. 5) is denied.

DATED: August 31, 2016

/s/ John A. Mendez
UNITED STATES DISTRICT COURT JUDGE

FILED AUGUST 10, 2016

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFERSON A. McGEE, NO.: 2:16-cv-1796

Plaintiff, JAM-EFB-PS

v.

STATE OF CALIFORNIA, FINDINGS AND

Defendants, RECOMMENDATIONS

_____/

On August 4, 2016, plaintiff filed a motion for a temporary restraining order to prohibit defendants from, among other things, participating in a racially motivated conspiracy; using "law enforcement programs and activities receiving" federal financial assistance to discriminate against plaintiff; conspiring with "other persons to [commit] attempted murder, kidnaping, torture," and various other crimes; and refusing to protect plaintiff and his property. ECF No. 5. As discussed below, plaintiffs' motion for injunctive relief must be denied.

A temporary restraining order may be issued upon a showing "that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). The purpose of such an order is to preserve the status quo and to prevent irreparable

harm "just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters,* 415 U.S. 423, 439 (1974). "The standards for granting a temporary restraining order and a preliminary injunction are identical." *Haw. County Green Party v. Clinton,* 980 F. Supp. 1160, 1164 (D. Haw. 1997); cf. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.,* 240 F.3d 832, 3911.7 (9th Cir. 2001) (observing that an analysis of a preliminary injunction is "substantially identical" to an analysis of a temporary restraining order).

A preliminary injunction will not issue unless necessary to prevent threatened injury that would impair the courts ability to grant effective relief in a pending action. *Sierra On-Line, Inc. v. Phoenix Software, Inc.,* 739 F.2d 1415, 1422 (9th Cir. 1984); *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989). A preliminary injunction represents the exercise of a far reaching power not to be indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). In order to be entitled to preliminary injunctive relief, a party must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter v. Natural Res. Def Council, Inc.,* 555 U.S. 7 (2008)). The Ninth Circuit has also held that the "sliding scale" approach it applies to preliminary injunctions—that is, balancing the elements of the preliminary injunction test, so that a stronger showing of one element may offset a weaker showing of another—survives *Winter* and continues to be valid.

Alliance for Wild Rockies v. Cottrell, 622 F.3d 1045, 1050 (9th Cir. 2010). "In other words, 'serious questions going to the merits,' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id*

Plaintiff filed this action against the State of California, County of Sacramento, City of Sacramento, Sacramento Elite Security, Bridgeport Homeowners Association, Associa of Northern California, Sean Swarthout, and Gary Swarthout, Jr. ECF No. 1. The complaint alleges claims for violations of 42 U.S.C. 1981, 1982, 1983, 1985, 1986, 2000, and California Civil Code 51 based on an alleged conspiracy to discriminate against African Americans. *Id.*

However, plaintiff does not establish that he is likely to succeed on his claims. His complaint rests largely on vague and conclusory allegations of a vast conspiracy between the State of California, Sacramento County, the City of Sacramento, and private parties. *See generally* ECF No. 1. "The 'irreducible minimum,' however, is that the moving party demonstrate 'a fair chance of success on the merits' or 'questions . . . serious enough to require litigation." *Sports Form, Inc. v. United Press Intern., Inc.,* 696 F.2d 750, 753 (9th Cir. 1982) (quoting *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers,* 584 F.2d 308, 315 (9th Cir. 1978)). "No chance of success at all . . . will not suffice." *Id.* Here plaintiff's complaint is devoid of factual allegations that, if accepted as true, would demonstrate the existence of a

conspiracy or support a cause of action. Thus, plaintiff fails to satisfy the likelihood of success prong of the standard for a temporary restraining order.

Furthermore, plaintiff fails to demonstrate that the injunction sought is necessary to preserve the court's ability to grant effective relief on his claims and that it is the least intrusive means for doing so. He only generally claims that he will suffer Irreparable harm if an injunction does not issue, without identifying the specific harm he will suffer. He also fails to present evidence establishing that the balance of equities tips in his favor nor is there an adequate showing that the requested injunctive relief is in the public interest. Thus, plaintiff has not made the showing required to meet his burden as the party moving for injunctive relief, and his motion must be denied.

Accordingly, it is hereby RECOMMENDED that plaintiffs motions for injunctive relief (ECF No. 5) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. 636(b)(l). Within fourteen days after being served with these findings and recommendations, any arty may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan,* 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 10, 2016.

/s/ EDMUND F. BRENNAN

UNITED STATES MAGISTRATE JUDGE